



Presents

2020 Annual Meeting

MCLE: 1.0 Hour Legal Ethics – Legal Specialization: Legal Malpractice

[22] Show Me the Money: Ethical Issues in Charging and Collecting  
Attorney Fees

Saturday, September 26, 2020

10:15 AM - 11:35 AM

Speakers:

Merri A. Baldwin

Karen Goodman

David Majchrzak

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**SHOW ME  
THE MONEY**

**Ethical Issues in Charging  
and Collecting Attorney  
Fees**

# Speakers

**Merri A. Baldwin**, Rogers Joseph O'Donnell P.C., San Francisco

**Karen Goodman**, Goodman Law Corporation, Sacramento

**David Majchrzak**, Klinedinst, San Diego

**All of today's speakers are members of the CLA Legal Ethics Committee**

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# Introduction and Overview

# Today's Agenda

- Fee Agreements
- Fee Sharing
- Unconscionability
- Billing Issues
- Fee Disputes
- Protecting your fee in the event of a client bankruptcy or other collection efforts

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# FEE AGREEMENTS

# Overview of Ethical Issues that Apply to Fee Agreements

- Attorney-client relationship is a contractual one, subject to certain limitations and rules
- Various rules apply: Rule 1.5 Fees; 1.5.1 Fee Division Among Lawyers; 1.15 Safekeeping Funds; Bus. & Professions Code sections; case law
- Types of fees: hourly; contingent; flat; hybrid
- Written fee agreement is confidential (B&P Code section 6149)

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# Hypo

Client contacts Lawyer and asks her for some advice about a possible claim against his employer. Lawyer knows Client socially and answers his questions.

The following week, Lawyer sends Client a simple fee agreement that provides that Client will pay Lawyer \$2000 that will be “earned upon receipt”, and a contingent fee of 40% of any net recovery.

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# Did Lawyer Act Ethically?

- Fee agreement requirements set forth in Business & Professions Code sections 6147-6149.5
- Contingent fee requirements: section 6147(a)(1)-(5). Very specific, and failure to include makes agreement voidable by the client!
- “Earned upon receipt”: Rule 1.5- only for true retainers, and disclosure requirements

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# Hypo

Lawyer decides halfway through representation that contingent arrangement just is not going to be worth it to her.

She sends Client a new fee agreement that says the Client will pay “the Lawyer’s regular hourly rate, which may change from time to time at Lawyer’s discretion”.

New agreement also gives Attorney a lien against recovery.

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# Did Lawyer Act Ethically?

- Hourly fee agreements governed by B&P Code section 6148
- Must set forth basis of compensation, among other things. B&P Code section 6148(a) Effect of failure to comply: voidable at client's election
- Note exceptions where the rule does not apply. 6148(d)

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# Revising Fee Arrangement Midstream

- Problematic: may be subject to rules governing business transaction with client (Rule 1.8.1)
- Requires that new fee agreement terms be fair and reasonable; fully disclosed to client in writing; client advised to seek independent counsel; and client thereafter consents in writing.
- Lien: does that language independently trigger 1.8.1 as a “security” interest?

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# FEE SHARING

# You want me to share?

Client engages Lawyer A to represent Client regarding practice area that Lawyer A has little to no experience in.

With Client's consent, Lawyer A asks Lawyer B to "help" in exchange for half of the contingency fee.

One year in, Client fires Lawyer A, but wants Lawyer B to continue the representation.

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# Sharing fees

*May only share among lawyers*

*Must comply with Rule 1.5.1*

*Pure referrals permissible*

*Resolving problems*



# UNCONSCIONABLE FEES

*Big mouthfuls often choke.*

# Flat fees, retainers and contingency

- Attorney Chris Davis was retained by Will and Donna Sharp to review a file in reference to a pending civil action in which they were already represented by counsel. The civil action concerned undisclosed defects in a home the Sharps purchased. Mr. Davis was paid \$25,000 as a flat fee to provide a second opinion. Mr. Davis experience was primarily in criminal law. Mr. Davis said that the prior lawyer was not properly representing the Sharps.
- Mr. Davis said he would represent the Sharps in the litigation, but would need a \$50,000 nonrefundable retainer. He proposed that he would be paid 50% of the Sharps' recovery at the end of the case even if he had previously withdrawn or was terminated.
- Mr. Davis also provided that at the end of the case he would be entitled to attorney's fees paid by the other side based on the purchase contract. He represented in the fee agreement his hourly rate was \$750 an hour.

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# Rule 1.5 bars unconscionable fees

- Fraud or overreaching
- Failed to disclose material facts
- The amount of fee in proportion to the value of the services
- Sophistication of client and lawyer
- Novelty and difficulty
- Amount involved and results obtained
- Client's informed consent

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# True Retainer—Rule 1.5(d)

- Fee paid to ensure the lawyer's availability during a specific time or a specific matter.
- Requires client's informed written consent after full disclosure.
- Evaluate circumstances –were fees earned?
  - Is “non-refundable” retainer unconscionable under facts?
  - Without time records, may be required to disgorge retainer.

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# STANDARD FEE STRUCTURES

- One size does not fit all.
- Understand case before finalizing fee agreement.
- Make adjustments at the end of the case in the event the fees recovered are disproportionate to services provided or results obtained.
- Full disclosure of fees and costs during the relationship is critical.

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“ *Unconscionable fee  
“so exorbitant and  
wholly disproportionate  
to the services  
performed as to shock  
the conscience.”*”

# BILLING ISSUES

# Hypo

- Lawyer wants to simplify her practice and the administrative burdens, to make her services less expensive for clients
- Begins to send simplified bills to hourly fee clients that state the date, what was done, and the total charged for the task
- Rather than list each task separately on the bill, Lawyer lists all tasks performed on a given date together

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# Is Lawyer's Billing Ethical?

- Bills: must state the “amount, rate, basis for calculation”. B&P Code section 6148(b)
- Failure to comply: agreement voidable? 6148(c)
- Block billing: no specific prohibitions but many critics including insurance company guidelines
  - Many fee dispute cases consider argument that block billing improper because does not inform client of how much time spent on each task
  - Not presumptively improper

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# Practical Tips: Billing Best (or Better) Practices

- Use descriptive entries to give client information about what you have done on a matter
- Send out bills promptly
- Supervise associates and staff billing
- Review before sending
- Exercise billing judgment to deduct fee charges that do not appear justified under circumstances

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# FEE DISPUTES

# Where's my money?

Lawyer learns from representation that Client is holding funds in shell companies.

Claiming inability to pay, Client stops paying Lawyer's invoices, but does not dispute amounts owed.

Client does not pay default judgment that Lawyer obtains post-representation.

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# Pursuing clients for fees

*Avoiding fee disputes to begin with*

*Mandatory fee arbitration*

*Considerations when trying to recover fees*

*Clients who attempt to negotiate away statutory fees*

# WHERE'S THE MONEY?

*Collecting fees from the bankrupt client*

# CLIENT'S BANKRUPTCY

- Lawyer accrues a large bill in trying a case for a real estate broker.
- Immediately following trial (with a verdict for plaintiff), the broker files bankruptcy.
  - How is the lawyer going to get paid?
  - What can the lawyer do in advance of the trial to reduce the risk of not being paid?

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# PRIOR PLANNING

- Retainer to cover anticipated trial fees and costs.
- But preferential payments 90 days before BK filing can be challenged by the Trustee.
- Deed of trust to secure payments for trial fees.
- But need to comply with Rule 1.8.1.
  - Informed written consent
  - Fair on face
  - Independent counsel review.

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# Fees paid in Bankruptcy

- Disclose to court
- Obtain court approval of representation and fee structure
- Keep accurate time records

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